UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

DEMARCUS DAVIS

CRIMINAL ACTION

NO. 18-134-JWD-EWD

RULING AND ORDER

This matter comes before the Court on the Motion to Suppress (Doc. 10) filed by Defendant Demarcus Davis. The Government opposes the motion. (Doc. 13). On February 15, 2019, the Court held an evidentiary hearing on the motion. The parties then submitted post-hearing briefs (Docs. 20 & 21). After careful consideration of the parties' arguments, the facts in the record, and the applicable law, and for the following reasons, the defendant's motion (Doc. 10) is denied.

I. FACTUAL BACKGROUND

On August 18, 2018, Detective Kyle Hotard of the Livingston Parish, Louisiana Sheriff's Office was conducting a sobriety checkpoint on Highway 42 in Port Vincent, Louisiana. (Doc. 17 at 5–6). Detective Hotard was the first officer in line, closest to a bridge over which oncoming motorists had to drive to reach the checkpoint. (*Id.* at 6–7). Detective Hotard observed a vehicle driven by Demarcus Davis approach the checkpoint and swerve to the right, nearly striking a guardrail. (*Id.* at 7). While the vehicle swerved, Detective Hotard saw the driver, Davis, "reaching down to his right towards the floorboard." (*Id.*). Davis's vehicle then returned to its lane of travel and stopped at the checkpoint. (*Id.*).

Detective Hotard spoke with Davis and asked him if he had consumed alcohol, which Davis denied. (Doc. 17 at 7). He then asked Davis where he was traveling from, and Davis explained that "he was coming from a show in Baton Rouge, back to Baton Rouge." (*Id.* at 7–8). This

surprised Detective Hotard because the bridge Davis crossed did not lead to or from Baton Rouge, Louisiana, but instead from Ascension Parish to Livingston Parish. (*Id.* at 8). Davis appeared nervous and his hand was shaking. (*Id.*). He informed Detective Hotard that he did not have a driver's license. (*Id.*).

While speaking to Davis, Detective Hotard noticed a yellow Fanta pineapple soda bottle in the center console next to a Styrofoam cup. (Doc. 17 at 8). The soda bottle contained a green liquid. (*Id.*). This stood out to Detective Hotard because he knew that pineapple-flavored soda is typically yellow. (*Id.*). Based on Detective Hotard's experience in narcotics interdiction, this discrepancy led him to believe that the "drink was manipulated some kind of way." (*Id.* at 9). Detective Hotard testified that fruity sodas are often mixed with promethazine, which can be either red, green, purple, or clear. (*Id.*). Based on his suspicion that the soda bottle contained promethazine, Davis's statement regarding his origin and destination, and the fact that he did not have a driver's license, Detective Hotard decided to investigate further. (*Id.* at 10). He asked Davis to leave his vehicle and had another officer pull the car to the side of the road. (*Id.*).

Detective Hotard next asked Davis why he was nervous, since driving without a driver's license was a "minor traffic violation." (Doc. 17 at 10). Davis explained that he was on probation for possession of codeine. (*Id.*). Detective Hotard then asked Davis if there was "anything illegal or anything that would get him in trouble inside of his car." (*Id.*). Davis replied "no," and "insisted" that Detective Hotard and his fellow officers "search the vehicle to prove that he had nothing to hide." (*Id.* at 10–11). Detective Hotard then asked Davis if he was giving consent to search his vehicle, and he replied, "yes, go for it." (*Id.* at 11). According to Sergeant Steven Erdey, "not only did [Davis] give consent, he encouraged us to search the vehicle" by saying "[s]omething along the lines of, 'yes, you can search it, go ahead.'" (*Id.* at 31). Detective Hotard removed the

soda bottle and Styrofoam cup. (*Id.*). He also found a baby bottle containing green liquid that he suspected to be promethazine in a pocket behind the front passenger seat. (*Id.* at 12).

Sergeant Erdey found a firearm tucked "underneath a panel of the middle console and the radio." (Doc. 17 at 12). The panel, which runs from the center console to the floorboard of the driver's side, was visibly loose, and a gap appeared between the panel and the carpet of the floorboard. (*Id.* at 32). Sergeant Erdey looked into the gap with his flashlight and saw the butt of a handgun, which he was able to remove without pulling or manipulating the loose panel. (*Id.* at 32–33). Once they found the handgun, officers advised Davis of his *Miranda* rights. (*Id.* at 33).

II. DISCUSSION

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "As the text makes clear, the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (internal quotation marks omitted). "[T]he Supreme Court has determined that warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions." *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971)). The government bears the burden of justifying a warrantless search. *United States v. Chavis*, 48 F.3d 871, 872 (5th Cir. 1995).

A. Consent

"It is well-established . . . that consent is one of the specifically established exceptions to the requirements of both a warrant and probable cause." *United States v. Jaras*, 86 F.3d 383, 388 (5th Cir. 1996) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). To establish valid consent, the Government "must demonstrate by a preponderance of the evidence that such

consent" is voluntary and either provided by the defendant himself or a third party with apparent authority. *United States v. Iraheta*, 764 F.3d 455, 462 (5th Cir. 2014). "Absent any limitation placed by the suspect, his consent to search a car will support an officer's search of unlocked containers within it." *United States v. Cotton*, 722 F.3d 271, 276 n.16 (5th Cir. 2013).

Davis asserts that he did not consent to a search of his vehicle. (Doc. 21 at 5). He highlights the lack of a written consent form or audio or video recording. (*Id.*). He concludes in briefing that it is "highly questionable" that officers did not provide a written consent form or have any recording of Davis providing consent. (*Id.*). The Government, on the other hand, introduced evidence that Davis consented to a search of his vehicle through the testimony of Detective Hotard and Sergeant Erdey. Both officers testified that Davis actively encouraged the officers to search his vehicle and replied affirmatively when asked if he was giving consent to search the car. The Court found the testimony of the officers to be credible. Davis maintained through counsel that he did not provide consent, but failed to produce any countervailing evidence at the suppression hearing.

Whether "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227. Courts in the Fifth Circuit apply a six-factor analysis to determine whether consent was voluntary. The factors are:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Perales, 886 F.3d 542, 546 (5th Cir. 2018). Though all six factors are relevant to the voluntariness inquiry, "no single factor is dispositive." *United States v. Shabazz*, 993 F.3d 431, 438 (5th Cir. 1993).

Applying these factors, the Court concludes that Davis voluntarily consented to a search of his vehicle. The first factor asks whether a reasonable person in the defendant's position would have felt free to leave. *United States v. Cavitt*, 550 F.3d 430, 439 (5th Cir. 2008). By the time he consented to the search, Davis had already admitted to an offense (that he did not have a driver's license) and had been directed to exit his vehicle, which was driven by an officer to the side of the road. Under these circumstances, a reasonable person would not have felt free to leave. Accordingly, the first factor weighs against voluntariness.

The balance of the remaining factors weighs in favor of voluntary consent, however. There is no evidence that Detective Hotard or Sergeant Erdey used any coercive procedures while questioning Davis. In fact, the encounter occurred because of a sobriety checkpoint designed to stop all vehicles in each direction. There is no indication that any officer "used verbal threats or intimidation to" obtain Davis's consent to search the vehicle, or that a "constitutional defect preceded or accompanied" the request. *Perales*, 886 F.3d at 547. Nor is there evidence that any officer had his weapon drawn. *See United States v. Mata*, 517 F.3d 279, 291 (5th Cir. 2008) (finding no coercion where officers did not have weapons drawn, threaten or yell at the defendant, or "treat him rudely"). Thus, the absence of any coercive police tactics militates strongly in favor of voluntariness. Moreover, both Detective Hotard and Sergeant Erdey testified to Davis's cooperation. He complied with the direction to get out of the car and permitted officers to move it to the side of the road. He also engaged in a fairly extensive discussion with Detective Hotard, volunteering that he did not have a driver's license and was on probation for a drug offense. By all indications, the interaction between Davis and the officers was cooperative and uneventful, and Davis's cooperation with police throughout the encounter weighs heavily in favor of a finding of voluntariness.

The remaining factors either weigh slightly against voluntariness or are not applicable to the facts at hand. For example, there is no evidence in the record regarding Davis's level of education and intelligence or whether officers made him aware that he could refuse to consent to a search. While the fact that both Detective Hotard and Sergeant Erdey testified that Davis "insisted" that officers search his vehicle heavily favors voluntariness, it does not inform the question of Davis's awareness of his right to refuse to consent. Lastly, it is unlikely Davis legitimately believed that no incriminating evidence would be found, given that officers immediately recovered two drinks containing narcotics—one of which was in plain view in the center console—in addition to a firearm behind a loose panel on the driver's side. However, as the Government points out, Davis may have felt that the most obviously-incriminating evidence, the firearm, was adequately hidden.

Nevertheless, based on the totality of the circumstances and the undisputed credible testimony of the two officers on the scene, the Court concludes that Davis voluntarily consented to the search of his vehicle. *See United States v. Martinez*, 410 F. App'x 759, 764 (5th Cir. 2011) (finding voluntary consent where the defendant's "consent to the search was consistent with the rest of his behavior . . . because at no point did he fail to provide anything but complete cooperation"). And while Davis makes much of the lack of written consent form or audio or video recording of the encounter, neither is required for the Government to meet its burden of demonstrating valid consent. *See, e.g.*, *United States v. Carrate*, 122 F.3d 666, 670 (8th Cir. 1997) ("[E]ven though the troopers did not provide [the defendant] with a written consent form or explicitly inform him of his right to withhold consent, such actions are not necessary predicates to establish that a person voluntarily consent to a search."). Davis's motion to suppress could be denied on this basis alone.

B. Automobile Exception

Even in the absence of consent, however, the officers' search would have been proper under the automobile exception to the Fourth Amendment's warrant requirement. "Under the automobile exception, police may stop and search a vehicle without obtaining a warrant if they have probable cause to believe it contains contraband." *United States v. Beene*, 818 F.3d 157, 164 (5th Cir. 2016). A search under the automobile exception may extend to "compartments and containers within the automobile so long as the search is supported by probable cause." *California v. Acevedo*, 500 U.S. 565, 570 (1991). The scope of the search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824 (1982).

The Supreme Court has identified two key justifications for the automobile exception: the "ready mobility" of vehicles and "the pervasive regulation of vehicles capable of traveling on the public highways." *Collins v. Virginia*, 138 S. Ct. 1663, 1669–70 (2018). When these justifications "come into play, officers may search an automobile without having obtained a warrant so long as they have probable cause to do so." *Id.* at 1670 (internal quotation marks omitted). "Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (internal quotation marks omitted). Whether an officer has probable cause to search "depends on the totality of the circumstances viewed in light of the observations, knowledge, and training of the law enforcement officers involved in the warrantless search." *United States v. McSween*, 53 F.3d 684, 686 (5th Cir. 1995) (internal quotation marks omitted).

Here, Detective Hotard had probable cause to believe that Davis's vehicle contained narcotics on the basis of multiple factors: (1) his vehicle's sudden swerve upon entering the

checkpoint; (2) his reaching toward the floorboard; (3) his apparent nervousness; (4) his prior drug offense; and (5) the soda bottle containing a green liquid Detective Hotard suspected might contain a controlled substance based on his extensive experience as a narcotics detective. Thus, once probable cause to believe the vehicle contained narcotics existed, officers could search "compartments and containers within the automobile" which might contain narcotics. *Acevedo*, 500 U.S. at 570. Moreover, because Davis had apparently reached toward the lower center console area, and the panel in that area was visibly loose, officers were particularly justified in searching behind the panel.

That Detective Hotard acknowledged during the suppression hearing that the soda bottle could have contained a substance other than promethazine does not alter this calculus. "Proof beyond a reasonable doubt is not required for probable cause, which deals with on-the-spot decision-making by reasonable officers considering the totality of the circumstances." *Carthon v Prator*, 408 F. App'x 779, 783 (5th Cir. 2010). Here, the totality of the circumstances included, among other things, Davis's visible nervousness, his sudden reaching and swerving upon entering the police checkpoint, his unclear explanation of where he was traveling to, the discrepancy between the color of the liquid and the color of the soda bottle, and Davis's admission that he was on probation for a past drug offense. Considering all of these circumstances in addition to the soda bottle in Detective Hotard's plain view, officers had probable cause to search Davis's vehicle under the automobile exception.

Davis's arguments regarding the presence of probable cause and the scope of the search can be dispatched relatively briefly. He argues that probable cause was developed solely based on the color of the liquid in the soda bottle. (Doc. 21 at 2). But Detective Hotard's probable cause was based on the numerous factors described above, the color of the liquid being just one of several

circumstances heightening Detective Hoard's suspicion. These factors combined to form the "fair probability" that Davis's vehicle contained contraband.

Moreover, the scope of the officers' search was not limited to "bottles or objects" containing "a mixed drink that contained promethazine," as Davis suggests. (Doc. 10-1 at 3; Doc. 21 at 3–4). Rather, officers could search any compartment or container in the vehicle that might contain narcotics. The mere fact that Detective Hotard saw what he reasonably believed to be a substance containing promethazine in a soda bottle did not limit his search specifically to other soda bottles. Instead, officers could "search every part of the vehicle and its contents that may conceal the object of the search"—here, narcotics. *Ross*, 456 U.S. at 825. Accordingly, it was reasonable for officers to peer behind an open panel which they previously observed Davis reaching toward as he entered the police checkpoint. The scope of the search did not exceed what is objectively reasonable under the Fourth Amendment, and the requirements of the automobile exception were clearly satisfied.

III. CONCLUSION

Accordingly, for the foregoing reasons, **IT IS ORDERED** that the Motion to Suppress (Doc. 10) filed by Defendant Demarcus Davis is **DENIED**.

Signed in Baton Rouge, Louisiana, on May 23, 2019.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA